United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1331

To be argued by
JOHN P. COONEY, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1331

UNITED STATES OF AMERICA,
Appellee,

—v.—

URBAN J. DIDIER, a/k/a "HARP,"
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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United States Court of Appeals

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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—v.—

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Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Urban J. Didier, a/k/a "Harp," appeals from a judgment of conviction entered on April 20, 1976, in United States District Court for the Southern District of New York, after six days of trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury.

Indictment 73 Cr. 169, filed on February 16, 1973, charged Urban J. Didier, a/k/a "Harp" and two others, John Lombardozzi and Edward K. Ashdown, in two counts. Named as a co-conspirator but not a co-defendant in this indictment was Dinty Warmington Whiting.

In Count One, Didier and the others were charged with conspiracy to transport stolen securities in foreign

commerce, a violation of Title 18, United States Code, Section 371. Count Two charged Didier and Lombardozzi with the substantive offense of transportation in foreign commerce of approximately $500,000 worth of stolen securities in violation of Title 18, United States Code, Sections 2314 and 2.

The first trial of the indictment commenced on November 26, 1973, and ended on December 3, 1973, in a mistrial when the jury failed to reach a verdict as to either Didier or Ashdown.

The second trial commenced on April 12, 1976. On April 20, 1976, the jury returned a verdict of guilty against Didier on both counts. On June 1, 1976, Didier was sentenced to six months imprisonment on Count One and twelve months imprisonment on Count Two, to be served consecutive to each other. Didier was also fined $10,000 on Count One, $10,000 on Count Two and placed on three years' probation.*

Didier is presently on bail pending this appeal.

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* The defendant Lombardozzi pleaded guilty to Count One on November 26, 1973, and was sentenced on September 27, 1974, to eighteen months imprisonment, consecutive to a sentence he was then serving. Dinty Whiting pleaded guilty to a related indictment (71 Cr. 565) on December 5, 1972, and was sentenced on August 17, 1976, to ten years imprisonment, execution of sentence suspended. On July 16, 1975, a bench warrant was issued for the defendant Ashdown who has since been a fugitive. See Argument, Point B(2), *infra*.

Statement of Facts

Synopsis of evidence at trial *

In October, 1970 "Big John" Lombardozzi, a reputed organized crime figure (Tr. 275-6)** told Dinty Whiting that he had access to certain stolen securities, which were too "hot" to fence through his normal channels. Whiting was asked to find a foreign outlet for these stolen securities. (Tr. 59-64). On a subsequent visit to Los Angeles, Whiting met and recruited as Lombardozzi's foreign fence the defendant Didier, a financial analyst doing business in Munich, Germany. Didier was told that, because the stock he would be selling was in "street name" and had no proof of ownership, it would be made available to him at a very favorable discount. (Tr. 64-80).

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* On Appeal Didier concedes that his trial was error-free and, understandably, neglects to include in his brief a detailed recitation of the compelling evidence of his guilt. The Government submits that it is essential to present in detail, in an Addendum to the brief, a description of the evidence at trial. Although this evidence does not directly rebut Didier's speedy trial argument, the Government submits that the evidence presents the proper prospective of the appellant and his role in the delay in retrial. While in his brief Didier attempts to show himself as a uninformed and unwitting and therefore passive victim of a Government plot to delay his retrial, the evidence at trial supports the Court's conclusion that Didier is a "conniving scoundrel" (Tr. 827), memorable even in the context of a thirty-six year career on the bench (Tr. 849-50), who rather than having been victimized, authored or condoned the delays of his retrial and now is attempting to use the speedy trial rules to avoid responsibility for his crimes.

** "A." refers to pages of Appellant's Appendix; "App. Br." refers to pages in the Appellant's Brief; "G. App." refers to pages of the Government's Appendix;" "Tr." refers to Trial Transcript; and "GX" refers to the Government Exhibits at trial.

Two separate blocks of stock (hereinafter "Group No. 1" and "Group No. 2")* stolen in New York from New York Stock Exchange members (GX 5, 25, 26) and worth a total of approximately one million dollars (GX 24) were made available to Didier for sale. However, so well known was the stock to be stolen (both groups had been placed on the list of missing securities circulated by the New York Stock Exchange and stop orders had already been placed on a portion of Group No. 1) that Didier experienced difficulty in its disposition even in Europe. (Tr. 99-109, 315-319).

Ultimately, in November, 1970, Didier negotiated an agreement by which a portion of Group No. 1 would be sold in Europe by means of an exchange for the shares of a Swiss corporation. (GX 32; Tr. 627-637). With respect to Group No. 2, which he had been told was less "hot", Didier made a fatal error and attempted to sell it in the United States. While Didier assured Whiting that he had checked it carefully and that the securities could be sold without fear of apprehension and arrest (Tr. 130), unbeknowst to Didier or his associates the sale in New York had been arranged by informants of the Federal Bureau of Investigation. (Tr. 320-322). When Whiting, following coded instructions for the disposition of the stock written by Didier (GX 7), arrived at a New York bank, he was arrested and Group No. 2 was seized. (Tr. 23-32).

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* Group No. 1, consisting of common shares of Avon Products, Fleetwood Enterprises, Lincoln National Corporation, Motorola and Guerdon Industries, had been stolen in New York from Emmanuel Deetjen & Co. (GX. 25). Group No. 2, consisting of common shares of Xerox, General Electric, General Motors and Standard Oil of California, had been stolen from Hayden Stone, Inc., in September, 1970. (Tr. 398-399; GX 26).

Had Didier successfully fenced for Lombardozzi the two blocks of stolen stock, his commission would have totaled approximately $360,000, more than 50% of the proceeds of the sale of Group No. 1 and 40% of the proceeds of Group No. 2. (GX 7; Tr. 76-80; 170-174; 235-249).

ARGUMENT

The delay in the retrial of the appellant violated neither Rule 6 of the Speedy Trial Rules nor the speedy trial provision of the Sixth Amendment.

Didier's sole contention on appeal is that the Government wilfully and deliberately delayed his retrial for a period of twenty-eight months in order to gain an unspecified prosecutorial advantage. (App. Br. 29-30). This delay, Didier argues, caused undue hardship upon him and requires that his conviction be reversed and the indictment be dismissed. Appellant's contention was twice raised before the Court below and was rejected as being without merit. See 401 F. Supp. 4 (S.D.N.Y. 1975); A. 66.

The Government submits that Judge Cooper's conclusions were clearly correct and should be affirmed.

A. Prior proceedings

Didier's first trial ended on December 3, 1973, with the declaration of a mistrial when the jury was unable to reach a verdict. On May 22, 1974, the Government served on the Court and counsel to Didier a notice of readiness to proceed with the retrial of Didier on or

after May 23, 1974. However, pursuant to the Government's request, retrial of Didier was not scheduled until the Fall, 1974, in the hope that the United States Court of Appeals for the Fifth Circuit would, in the interim, decide the appeal of Ashdown from an unrelated conviction of mail fraud. Since Ashdown had been sentenced to seven years imprisonment in that case, the Government contemplated severing Ashdown, immunizing him, and calling him as a witness against Didier should his appeal be affirmed. (App. 25-27).

However, Ashdown's conviction was not affirmed until March 17, 1975, *United States* v. *Ashdown*, 509 F.2d 793 (5th Cir. 1975), after this Court's initial interpretation of the strictures of Rule 6 * of the Southern District Plan for Achieving Prompt Disposition of Criminal Cases (hereinafter "the Southern District Rules") in *United States* v. *Drummond*, 511 F.2d 1049 (2d Cir. 1975), *cert. denied*, — U.S. — (1976). Notwithstanding its hopes with respect to Ashdown's appeal, in light of *Drummond's* ruling that Rule 6 was satisfied only by retrial, not mere readiness, the Assistant United States Attorney then assigned to the case immediately attempted to obtain a prompt retrial of the defendants Didier and Ashdown. First, the Government attempted to contact the Court directly but was informed that Judge Cooper would be sitting in another District from February 17th until March 14, 1975. The Government sent letters to both the

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* Rule 6, effective April 1, 1973, provided:

Where a new trial has been ordered by the district court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than 90 days after the finality of such order unless extended for good cause.

The provision was amended effective September 29, 1975, by Rule 7 which provided for a 60 day period for retrial.

Court and defense counsel of record requesting that the retrial be held as soon as possible. In response to the Government's request, the Court scheduled a pre-trial conference on April 2, 1975, for the purpose of setting a trial date. (A. 21-22).

In the meantime, however, in January, 1974, Didier and his original trial attorney of record, Robert Talcott, Esq., had terminated their relationship without notifying either the Court or Government (A. 16-1.). In addition, Talcott had moved his offices from Sherman Oaks, California, to Los Angeles, California. As a result, both the Government's letter of March 25, 1975, and the Court's letter of March 27, 1975, which notified the defendant of the necessity of setting an immediate trial date and which were addressed to Talcott's former office, were returned unopened. At the Court's direction, the Government then telephoned Talcott, who, for the first time, informed the Government that he might no longer represent Didier. The Assistant United States Attorney asked that he be advised by April 9, 1975, as to whether Didier would be represented by Talcott, by new retained counsel or by court-appointed counsel. (A. 25, 21-23).

In late April or early May, 1975, Didier informed the Government directly that Rudolph Harper, Esq., had been retained as his new attorney. On June 12, 1975, Harper attended a pre-trial conference and advised the Court that he would be ready for retrial on September 2, 1975. (A. 23).

On June 30, 1975, Didier filed his initial motion to dismiss the Indictment on the grounds that under *Drummond*, the Government had failed to comply with the provisions of Rule 6 and with the safeguards of the Sixth Amendment. On July 29, 1975, the Court filed its opinion denying Didier's motion and reaffirming September 2, 1975 as the retrial date. *United States* v. *Didier*, 401 F. Supp. 4 (S.D.N.Y. 1975).

While this motion was pending, on July 16, 1975, the Court was informed that Didier's co-defendant Ashdown had disappeared and had apparently become a fugitive. A bench warrant for Ashdown's arrest was issued by the Court. (A. 59-60).

Having had only one month to search for Ashdown, on August 8, 1975, the Government applied to the Court that the retrial scheduled for September 2, 1975 be adjourned *sine die* while it continued its efforts to apprehend the fugitive. Didier's counsel was immediately notified by the Government of the Court's decision to grant this adjournment and the reason for this adjournment. Didier was also specifically informed that if he had any objection to the adjournment, the Court should be contacted. (A. 60-61).*

No objection was made to this adjournment until February 20, 1976, when Didier renewed his motion to dismiss.** On February 20, 1976, Judge Cooper filed his

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* Most startling is Didier's contention that, before Judge Cooper below, Didier ". . . claimed that the Government did not advise him of the reason for the delay." (App. Br. 11, footnote at 26). The appellant does not cite nor is there any support for this statement in the record below. The statements in the affidavit of the Assistant United States Attorney that he informed Didier of the reason for the adjournment and his invitation to Didier to inform the Court if he objected were *not* contested. Indeed, if anything, the affidavits submitted by Didier indicate that as early as July 21, 1975, Didier was aware of Ashdown's disappearance, (App. 30), and that by December 23, 1975, Didier was aware that this was the basis for the adjournment. (App. 49). Regardless, Didier cannot now contest this crucial fact—which Judge Cooper specifically found in his second memorandum opinion, App. 67-68—having conceded it below.

** While contending that the delay caused Didier hardship, Didier conceded that there was merit in the Government's efforts to avoid multiple trials by locating Ashdown (A. 49).

opinion denying Didier's motion and set March 8, 1976, as the retrial date. (App. 65-72).

At no time during the pendency of retrial did Didier ever demand a prompt trial. Indeed, by letter dated February 25, 1976, Didier requested that the March 8, 1976, trial date be adjourned until April 12, 1976, "or any date after that" for the sake of his own business convenience. (G. App. 1a).* Pursuant to this request, Didier's retrial was adjourned and actually commenced on April 12, 1976.

B. Under Rule 6, there was "good cause" for extending the ninety-day period.

1. Delay from mistrial to motion: December 3, 1973, to July 29, 1975.

Rule 6 provided that the ninety-day period may be extended for "good cause." In *Drummond* this Court stated that: "In view of the rigidity of the command of Rule 6 . . . the escape hatch of 'good cause' must be construed with an awareness of practicalities." 511 F.2d at 1053. Among the practicalities considered relevant in that case, and equally applicable here, were: (1) the fact that the Government was clearly ready to retry the defendant but had "obviously misapprehended the change brought about [by the enactment of Rule 6] . . ." *Id.*; and, (2) the fact that the defendant was free on bail throughout the relevant period and had been inactive in obtaining a prompt trial. *Id.* at 1054.

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* Significantly, the Government has been unable to find a reference to this request in either the Appellant's Brief or Appendix.

There can be no question that, prior to *Drummond*, the Government misconstrued its obligation with respect to retrials following mistrials. As noted by the District Court, the source of the misconception was, in this case as in *Drummond*, the apparent conflict in the provisions of Rule 6 of the Southern District Rules and Paragraphs 4 and 6 of the Second Circuit Rules regarding Prompt Disposition of Criminal Cases (hereinafter the "Second Circuit Rules"). While the relevant Second Circuit provisions required only that the Government be ready within six months of retrial, the Southern District Rules provided that retrial must, in fact, commence within ninety days.* Further the genuineness of this misunderstanding is demonstrated by the Government's filing of a notice of readiness within six months after mistrial. This act could be for no purpose other than to satisfy the Second Circuit Rules. *See United States* v. *Bisgyer*, 384 F. Supp. 504, 505 (S.D.N.Y. 1974). Similarly, the

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* The Second Cir. Rules were effective as of May 24, 1971. Rule 4 of those rules provided that the Government must be *ready* for trial within six months after charges are brought against the defendant. Rule 6 specifically provided that "[i]f the defendant is to be retried following a mistrial, . . . the time shall run from the date when the order occasioning the retrial becomes final." Finally, Rule 9 provided that "[t]he District Courts may implement these rules in any manner not inconsistent therewith."

However, after the promulgation of these Rules, the Federal Rules of Criminal Procedure were amended to require that the Federal District Courts adopt plans for the prompt disposition of cases. Fed. R. Crim. P. 50(b). It was pursuant to this Rule that the Southern District Rules were made effective on April 1, 1973. As was suggested by this Court, it may be that in adopting this Rule the real focus was upon reducing the permitted period from six months to ninety days rather than upon the ramifications of the retrial requirement. *United States* v. *Drummond*, 511 F.2d at 1052.

strenuous and immediate efforts * taken by the Assistant United States Attorney to schedule prompt retrial after *Drummond* supports a conclusion that the Government failed to press for retrial within the 90 day period through honest misconception, not an odious deliberate plan as suggested by Didier.**

In addition to this "obvious misapprehension", the other practicalities considered relevant in *Drummond*, the defendant was free on bail and made no request for an early trial date, 511 F.2d at 1053-54, also support a conclusion that "good cause" existed for the delay here.

Finally, an additional consideration supporting "good cause" unique to this case is that in January 1974, almost immediately after the mistrial, Didier terminated his relationship with his original attorney, apparently in a dispute concerning his fee. Didier did not retain new trial counsel until May, 1975. Obviously, as a practical matter, Didier was not prepared to go forward with

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* These immediate and strenuous efforts are among the facts which clearly distinguish this case from *United States* v. *Yagid*, 528 F.2d 962 (2d Cir. 1976). There, more than three full months passed after *Drummond* before the Government's efforts resulted in scheduling a pretrial conference. *Id.* at 964. Although there were impediments in these efforts, none were, as here, caused by the defendant.

** The touchstone of Didier's argument on appeal is that the Government chose to ignore this Court's warnings of *Drummond* and *United States* v. *Roemer*, 514 F.2d 1377 (2d Cir. 1975) for its own prosecutorial advantage. App. Br. 18, 29-30. In addition to being factually unsupported, this contention is blind to the fact that the major portion of the delay in this case occurred before the cited cases were decided.

his trial without counsel and, thus, cannot complain that he was not retried during this period.*

In view of these compelling practical considerations, this Court should adopt an "indulgent view" in delay on retrial occurring prior to *Drummond's* clarification of

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* The Court below found that the period from March until July, 1975, when Didier hired new counsel, was excludable for good cause because this delay was occasioned by Didier's own failure and that of his former lawyer who not only did not inform the Court when he was dismissed as counsel, but even failed to apprise the Court or the Government of his new address. 401 F. Supp. at 8. This decision is supported by Rule 5(g) of the Southern District Rules which provided for the exclusion of "[t]he period during which the defendant is without counsel for reasons other than the failure of the Court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel." While this exclusion related directly to Rules 3 and 4, it clearly is premised upon a practical consideration appropriate in determining "good cause" in the context of Rule 6.

Moreover, the same logic applies to the entire period from January 1974 until Didier hired new counsel. During the period when he was without counsel, Didier never indicated his intention to proceed *pro se*, although he had attended the University of Southern California Law School (Tr. 573), nor did Didier ever indicate to the Court that he was indigent and needed court-appointed counsel. Indeed, the record of his employment and assets strongly indicate that Didier could hardly qualify for such an appointment. Didier had been continually employed in positions in the security industry, including that of a Vice-President at Shearson Hammel & Company in New York, for the period from 1957 thru 1973. For the two year period prior to trial, Didier was the president of a company managing business schools in the Los Angeles area. Whatever his income from these jobs, it allowed him to reside in Plandome, Long Island while in New York from 1962 to 1967 and, presently, in a $140,000 home in Pacific Palisades, California. (Tr. 442-43, 568-571, 838-839).

Rule 6.* *United States* v. *Roemer*, 514 F.2d at 1382; *United States* v. *Carone*, (70 Cr. 132) (Memorandum Opinion of Judge Tenney dated March 4, 1975). Where, as here, the delay was occasioned, at worst, by negligence, the public interest in deterring unnecessary delays in bringing criminal cases to trial is clearly outweighed ". . . by the concomitant vindication of the public's competing interest in the punishment and deterrence of criminal behavior." 514 F.2d at 1381.**

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* Although waiver of constitutional rights to a speedy trial are not favored, *Barker* v. *Wingo*, 407 U.S. 514, 525-526 (1972), as a practical consideration, it should be noted that Didier filed a written waiver of his speedy trial rights, signed by both Didier and his attorney, prior to his first trial. (App. 13). Until Didier made his motion to dismiss the Indictment, in which he apparently felt it necessary to repudiate the validity of this waiver (App. 16), this declaration of disinterest in prompt trial remained uncontradicted. While not suggesting that this waiver continued as legally binding upon the defendant after mistrial, indeed the law seems to support a contrary conclusion, *United States* v. *Gladding*, 265 F. Supp. 850 (S.D.N.Y. 1966); *United States* v. *Verville*, 281 F. Supp. 591 (E.D. Wisc. 1968), the receptiveness with which this Court views his present contention that he was interested in speedy retrial must be tempered by his tardiness in communicating that interest to the Court below. As Judge Cooper noted, Didier's "silence during these past months stands in sharp contrast to his present clamoring." 401 F. Supp. at 8-9.

While Judge Cooper noted the voluntary nature of the waiver, 401 F. Supp. at 6-7, he felt constrained not to base his decision on the waiver.

** This Court has noted that "the plan was not established primarily to safeguard defendants' rights . . . [but instead] to serve the public interest in the prompt adjudication of criminal cases." *United States* v. *Flores*, 501 F.2d 1356, 1360 n. 4 (2d Cir. 1974). Since the plan that controls this case has now been entirely superseded by the Speedy Trial Act, Title 18, U.S. Code, Sections 3161 *et seq.*, and rules promulgated thereunder, absolving the defendant of criminal liability so richly deserved would at this point prove nothing.

2. Delay from Ashdown's flight to trial: July 18, 1975 to April 12, 1976.

The adjournment following Ashdown's disappearance was clearly for "good cause."

With a focus on practicality, this Court has recognized that a delay for the purpose of finding a co-defendant fugitive is for "good cause" in the context of the six-month period in Rule 4 of the Southern District Rules. Rule 5 of these rules set forth those circumstances which toll the running of the six months period. Rule 5(e) provided for the exclusion of:

> A reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases, the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.*

In interpreting these rules, this Court has held that the Government may have a reasonable period in excess of six months to obtain the presence of a fugitive and that if a co-defendant wishes to proceed to trial separately it is his burden to move for severance. The trial court will then make a determination of whether there is "good cause" not to grant a severance. *United States* v. *Lasker*, 481 F.2d 229 (2d Cir. 1973), *cert. denied*,

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* Rule 5(d) provided that the period when a defendant, such as Ashdown, is a fugitive the running of the statutory period for that defendant is tolled. Although this exception also applied directly only to Rule 5, it is clear that such fugitivity constituted "good cause" under Rule 6.

415 U.S. 975 (1974);* *United States* v. *Cangiano*, 491 F.2d 906 (2d Cir.), *cert. denied*, 419 U.S. 904 (1974).

The obvious, practical consideration — avoidance of duplicative trials of the same issue — which was recognized in *Lasker* is even more compelling in the context of Rule 6. Having had one joint trial, the District Court was rightly concerned with a potential drain of its time and resources by the two additional separate trials of the same defendants, one scheduled for September 2, 1975 of the defendant Didier and another upon the apprehension of the fugitive Ashdown. Given these facts, an adjournment for a reasonable period to attempt to obtain the presence of the fugitive Ashdown was sensible and for "good cause".

Moreover, the admonition of the Court in *Lasker* that a defendant not be allowed to "mousetrap" the Government through the Southern District Rules, 481 F.2d at 233, is particularly salient in this case. Here, counsel for Didier was promptly informed of the Court's decision to adjourn this matter so that the Government could attempt to find Ashdown. Assistant United States Attorney Gold invited Didier's counsel to contact the Court directly if he objected to the adjournment. From that time until the filing of his second motion to dismiss, a period of some six months, the defendant neither ob-

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* Judge Lumbard's ruling in *Lasker* is instructive:

> In determining the proper operation of Rule 5, it is important to remember that the primary purpose of the Prompt Disposition Rules was to vindicate the strong public interest in the prompt resolution of criminal prosecutions. . . . It was not the . . . aim to make the Government vulnerable to dismissal of an indictment where a co-defendant is a fugitive from justice and the Government, with some reason, delays action against defendants who are present. 481 F.2d at 233.

jected to the adjournment nor, as mandated by *Lasker*, requested a severance so that his case could be immediately tried. Nevertheless, having tacitly consented to the adjournment * the defendant again on appeal attempts to take advantage of his co-defendant's flight to revive a motion that the Court properly rejected below. Didier's stratagem should not be rewarded.

C. Didier's constitutional right to a speedy trial has not been violated.

On appeal, Didier renews his contention that his Sixth Amendment right to a speedy trial was violated, causing him undue hardship.

In *Barker* v. *Wingo*, 407 U.S. 513 (1972), the Supreme Court delineated the criteria to be balanced in determining whether a delay in trial impinges on a defendant's right so as to foreclose further prosecution. Among these are the defendant's assertion of his right to a prompt trial and the prejudice caused the defendant by any delay.** *Id.* at 530. See also, *United States ex rel. Spina* v. *McQuillan*, 525 F.2d 813 (2d Cir. 1975); *United States* v. *Infanti*, 474 F.2d 522 (2d Cir. 1973).

Whereas in the Court below, Didier's alleged prejudice was couched in vague contentions of "mental anguish" and being forced to keep a "low profile" in the business community, on appeal the main thrust of his

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* In Lasker, the Court specifically held that the requirement of such a request in this context is not violative of the general provision of Rule 7 that no demand need be made by the defendant. 481 F.2d at 234.

** The other two factors, the length of the delay and the reason for that delay, are discussed in Paragraphs B(1) and B(2), *supra*.

claim of prejudice seems to be that the Government in some unspecified way gained a prosecutorial advantage by the delay. This change of emphasis may have been catalyzed by evidence at trial which established that affidavits submitted to exemplify Didier's business hardships were, at best, misleading.* Regardless, Didier makes no allegation that his own case was prejudiced but rather that the Government's case was improved. Even if this claim were supported, as it is not, by some factual showing, such a claim does not constitute constitutionally cognizable "prejudice". *United States* v. *Nathan*, 476 F.2d 456, 461 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973).

With regard to the second criteria, Didier's assertion of his right to prompt trial, the record is clear that

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* In his affidavit in support of his second motion. Didier gave as an example of his "low profile" his rejection of a lucrative position with a brokerage firm. Didier swore that ". . . I was offered the opportunity to join Snodgrass and Company . . . this offer I felt I had to refuse. . . ." (App. 54). However, at trial, Didier testified that he had in fact been employed by Snodgrass. (Tr. 443, 570, 572). When confronted in cross-examination with this apparent inconsistency the best Didier could do by way of reconciliation was that he had been "associated" with Snodgrass but not employed by it; Didier concedes that this association" was not made known to the lower court when it was asked to measure Didier's prejudice. (Tr. 572-581).

With regard to other financial hardship suffered by Didier, although his income while under indictment was less than $50,000 per annum it was sufficient to allow his residing in a $140,000 home (equity: $35,000) (Tr. 838-839) and operating his own business of managing business schools in the Los Angeles area (Tr. 848; G. App.). Without undue sarcasm, it can be such "financial hardship" hardly shocks the conscience of the community.

As to his mental anguish, there was no showing that Didier suffered anything but the normal adverse psychological effect of being under indictment. *United States* v. *Saglimbene*, 471 F.2d 16, 18 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

while Didier moved on several occasions for dismissal of the indictment he never moved for prompt trial, even after being invited to do so by an Assistant United States Attorney Gold in August, 1975. Rather, after 27 months of what he would have this Court believe was damaging delay, Didier asked that his trial be adjourned for the convenience of his business. Even crediting for a moment his vague contentions of prejudice, the Supreme Court and this Court have held the failure to request a prompt trial and, indeed, a request for an adjournment ". . . is strong evidence that these general claims of prejudice are not substantial." *United States* v. *Lasker*, 481 F.2d at 237; *Barker* v. *Wingo*, 407 U.S. at 531-532.

Balancing these interrelated factors, Didier's claim of constitutional deprivation must be rejected.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for the United States of America.

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GOVERNMENT'S APPENDIX

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Letter from Rudolph Harper, Esq. to the Hon. Irving Ben Cooper, dated February 25, 1976. . .

RUDOLPH E. HARPER
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2706 Artesia Boulevard
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February 25, 1976

The Honorable Irving Ben Cooper
United States District Judge
United States Court House
Southern District of New York
40 Foley Square
New York, New York

Re: United States v. Urban J. Didier, et al.,
73 Cr. 169.

Dear Judge Cooper,

I have been informed by your clerk as well as the United States Attorney's office, that the trial date has been set for March 8, 1976. I respectfully request that the trial date be set for April 12, 1976 for the following reasons:

First, I have three trials scheduled for the week of March 8, and other matters requiring considerable attention between March 1 through April 9, 1976. I have a clear calendar starting April 12, 1976 and continuing from that point on for any other date that would be more convenient for the court.

Second, upon informing Mr. Didier that the trial date had been scheduled for March 8, I was informed that he

Letter from Rudolph Harper, Esq., to the Hon. Irving Ben Cooper, dated February 25, 1976

also was in the midst of obtaining accreditation for certain schools that he managed, requiring his attention and active participation almost the whole month of March and for him at this time to start preparing again for his defense places him in the position of neglecting his obligations on this end, as he is without a suitable subordinate who can carry on his roll in these discussions.

For these reasons, it is respectfully requested that the trial date be scheduled for April 12, 1976, or in the alternative, any date after that which can be conveniently arranged between my office and your clerk. I fully understand that this is at the request of the Defendant and time is waived accordingly.

Very truly yours,

RUDOLPH E. HARPER
Attorney for Defendant Didier

REH/ek
cc U.S. Attorney's office

Letter from the Hon. Irving Ben Cooper, to Rudolph Harper, Esq., dated March 1, 1976. . . .

JUDGE'S CHAMBERS
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
New York, New York 10007

IRVING BEN COOPER
senior judge

March 1, 1976

Rudolph E. Harper, Esq.
2706 Artesia Boulevard
Redondo Beach, Ca. 90278

Re: U.S.A. v. Didier
73 Cr. 169

Dear Mr. Harper:

Judge Cooper has read your letter of February 25th and grants your application for adjournment. Trial date —and this is final—April 12, 1 p.m., Room 307. Trial memoranda and requests to charge are to be exchanged and filed no later than Wednesday, April 7 at 5 p.m.

Very truly yours,

(Mrs.) Margaret T. McDaid
Secretary to Judge Cooper

cc: John P. Cooney, Jr., Esq.
Assistant United States Attorney

ADDENDUM

Detailed Statement of Facts

A. The Government's Case.

Dinty Whiting testified that in October, 1970, John Lombardozzi used his services to dispose of approximately $300,000 in stolen land bank bonds in New Orleans, Louisiana.* Upon their return to Lombardozzi's home in Miami to divide the proceeds of this sale, Whiting was asked by Lombardozzi whether he would assist in disposing of other securities. Lombardozzi explained that he was unable to sell certain stock through his prior channels because it was too widely known as stolen and asked whether Whiting had any "foreign market outlets" for these "broken cans." ** Replying that he had none then, Whiting agreed to try to locate such an outlet. Whiting then proceeded to Nassau, the Bahamas, where he deposited his share of the money and set up a shell corporation, Lowjan, Ltd. (hereinafter "Lowjan") which he in-

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* Like Didier, see Defendant's Case, *infra*, Whiting's education and employment background qualified him for his assumed role as a legitimate businessman. Whiting graduated from Georgetown University's School of Foreign Service in 1949. From 1946 until 1953, Whiting held various government positions, including intelligence analyst for the Joint Chiefs of Staff and later vice-counsel to the American Consulate in Saigon, Vietnam. In 1956, he received his law degree from Tulane University and, until his conviction, practiced privately in Louisiana and Florida. However, in 1961 Whiting was convicted in this Court before the Hon. Charles M. Metzner for a wire fraud concerning bank deposits in Brazil and sentenced to four years and seven months imprisonment. *United States* v. *Whiting*, 308 F.2d 537 (2d Cir. 1962).

** Whiting testified that the stock was so "hot" that Lombardozzi derogatorily referred to it, in code, as "broken cans." (Tr. 76).

tended to use in future securities sales. (Tr. 59-64, 184-189, 197-200).

Later, while in Los Angeles in late October, 1970, Whiting and his business partner Ashdown were introduced to Didier as a financial consultant doing business in Munich, Germany. In preliminary conversations, Whiting probed Didier as to his interest in placing in Europe securities the transfer of which was restricted in the United States by domestic securities laws. Encouraged by Didier's receptiveness to this proposition, Whiting and Ashdown agreed to ask him to sell stock euphemistically described to Didier as having certain "irregularities" in Europe. The primary "irregularity" described to Didier was that the stock totally lacked any form identifying true ownership and how it came into Lombardozzi's possession—no buy/sell orders, no brokerage transactions slips. Moreover, the stock certificates were in "street name." * Didier was warned that the stock could not be marketed safely in the United States. However, because of these "problems", Didier was told that the stock would be made available to him at a very favorable price. Didier agreed to this proposition in principle, subject to specific information on the issuing characteristics of the stock. (Tr. 64-75, 196-7, 222-225, 279-289).

After these conversations with Didier, Whiting testified that he then contacted Lombardozzi in Miami and told him that he had found a way to market the stolen securities overseas. Whiting and Lombardozzi agreed

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* Whiting testified that street name securities are securities whose face endorsement indicates ownership by a brokerage house, not an individual. (Tr. 73).

that in order to encourage their "overseas outlet," the most favorable terms should be quoted to Didier: Lombardozzi would receive $215,000 from the sale, less than 50% of the stock's market value of $460,000, minus 5% to be paid to Whiting as a commission. All proceeds on the Group No. 1 stock in excess of $215,000 would go to Didier. These terms were readily accepted by Didier and it was agreed that the parties would meet in Nassau on November 5, 1970, so that the "broken cans" could be inspected. (Tr. 76-80; GX 24).

On November 5, 1970, Lombardozzi and Whiting travelled to Paradise Island in Nassau, Bahamas, for the planned meeting with Didier. Whiting testified that Lombardozzi insisted upon accompanying Whiting to this meeting so that he could inspect the individual to whom he would be entrusting Group No. 1. Although they were not introduced, Lombardozzi was pointed out to Didier as the source of the stock, was identified as "Big John", and as "one that would be very foolish to cross or to employ any hanky-panky with." (Tr. 156, 251). Then, in Whiting's hotel room, Didier was allowed to examine each share certificate. Whiting testified that Didier told him of efforts he had taken to dispose of the stock by using as collateral for a loan from a California business. Hearing this, Whiting again warned Didier that such a domestic transaction was out of the question and that the stock could only be safely sold overseas.*

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* Part of the defense at trial was that Didier did not know that the securities were stolen. To rebut this contention, the Government introduced evidence from Bruce Baker, an expert in the practices and rules of securities industry that Didier violated the basic rules and safeguards of the industry. First, the form of the certificates in Groups Nos. 1 and 2 were inherently

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Didier agreed to return to Europe to pursue possible outlets there and to keep in contact with Whiting, who was on his way to Montreal. (Tr. 81-95, 211-215).

Hardly had Whiting reached Montreal before he received telephone calls from Didier in which Didier complained that because of the "sensitivity of these particular stock certificates" that it was difficult to dispose of them even in Europe. As a result, Didier contended that the terms of sale be reduced so that the proceeds to Lombardozzi be $188,000 rather than the $215,000 originally agreed upon. (Tr. 99). When informed of this proposed amendment Lombardozzi instructed Whiting to acquiesce only for a "sure deal." (Tr. 101). Also, Lombardozzi told Whiting that he had another block of stock, Group No. 2, which was less "hot" and could be made available to Didier for disposition.* Because of

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suspect because they lacked stamps that indicated that New York State transfer tax had been paid or waived. Certificates in this form would be issued out of a brokerage house only to collateralize loans of its customers. (Tr. 405-406).

In addition, Baker testified that the regulations of the NASD and stock exchanges require that those presented with street name securities exercise particular care to determine that the shares are properly in the presenters hands. This "know your customer" rule required that some form of documentation of ownership, either a confirmation slip, delivery bill or other document be presented before such stock be accepted for sale. (Tr, 407-410). The Government argued, that from the other direct evidence of his guilty mind, Didier's failure, as a businessman sophisticated in the practices of the security industry. *see* Defendants case, *infra*, to follow these normal practices of the security industry established his knowledge that the stock was stolen.

* Again, a code was employed by Lombardozzi in the conversation: $500,000 worth of stock issued by four companies was "500,000 . . . yards . . . in four different runs"; "high quality" "undamaged goods" meant that the stock was not "hot listed" and could be sold with little chance of detection. (Tr. 102).

the relative ease with which it was anticipated that Group 2 could be sold, Lombardozzi insisted that he receive 60 percent of the market value for this second group of stock. (Tr. 100-109).* When informed of this proposition concerning Group No. 2, Didier agreed and told Whiting to deliver these shares along with Group No. 1 to him in Zurich on November 13, 1970. (Tr. 104-105).

The efforts made by Didier to dispose of both Groups was described further by Robert Parker, the former managing partner of a San Francisco brokerage firm of PMR & Company. Parker testified that he was contacted by Didier concerning a new customer, identified to him only as Lowjan, which Didier said intended to dispose of a large block of stock. Parker explained that Didier's Munich company, P.M.R., GmbH, was a limited partner in his brokerage firm and that the brokerage firm had conducted trades for Didier's Munich office in the past. Although Parker could not perform this service in connection with the sale of Lombardozzi's stock,** Didier asked Parker to make inquiries for the sale of Group No. 1, first in the United States, and later, after the November 5 Nassau meeting, in Europe. Similarly, Parker was also asked to arrange for the sale of Group

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* Lombardozzi also suggested that Whiting might use the availability of Group No. 2 as a bargaining fulcrum to recapture the original terms for the disposition of Group No. 1. (Tr. 103).

** On August 15, 1970, P.M.R. & Company withdrew from trading on the Philadelphia, Baltimore & Washington Exchange because it could no longer meet the net capital requirements of the Securities and Exchange Commission. The company never again became sufficiently solvent to reenter the market and was ultimately dissolved. (Tr. 303-307).

No. 2 through a California broker of Parker's acquaintance.* Didier also provided Parker with serial numbers and other information concerning Group No. 1 shares and asked that Parker determine their transferability. (Tr. 320-322).

It was pursuant to this check that sometime in November 1970, Parker discovered that a portion of Group No. 1 shares had "stop orders" ** on them and that another portion was listed to the wrong transfer agent. The existence of these impediments was passed along to Didier in Munich no later than by November 15, 1970. (Tr. 315-319).

Regardless, Didier proceeded in his efforts to dispose of this stock. After receiving Group No. 2 from Lombardozzi via an express on November 12, 1970, Whiting flew from Montreal to Zurich. (Tr. 228-230, GX 3 & 4). There on November 14, 1970, Didier was given both Groups No. 1 and No. 2 by Whiting in the lobby of the Baur-au-Lac Hotel. Didier then returned to Munich, with the stock, while Whiting remained in Zurich to await word concerning its imminent disposition. (Tr. 202-216).

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* Group No. 2 stock had been reported stolen on November 13, 1970. (Tr. 399; GX 26). However, the Federal Bureau of Investigation was informed of Parker's inquiries and gained the cooperation of his contacts to provide information that the stock was safe to transfer. In addition, the order which was to be placed through Morgan Guaranty was bogus, to induce Didier to return the stock back to the United States so it could be seized. (Tr. 320-322).

** "Stop orders" were defined as notices to the transfer agent that the shares should not be transferred. A stop is placed on a stock if it is lost and replaced, destroyed and replaced, restricted or, in this case, stolen. (Tr. 315-316).

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With respect to Group No. 1 Didier had arranged for the portion which had stop-orders to be transferred on November 17, 1970 in a private exchange for shares of a Swiss corporation.* The Group No. 1 shares upon which no stop orders were found were to be sold outright in Switzerland through a Zurich brokerage office.** (Tr. 325-327).

On November 17, 1970, having been told by Parker that no "stops" existed on the stock, Didier informed Whiting that he could dispose of Group No. 2 by delivery to the Morgan Guaranty Trust Company of New York. When Whiting objected to the procedure as dangerous, Didier assured Whiting that he "had checked the securities out very carefully", through Parker, and that Whiting could deliver the stock to New York "without fear of apprehension or arrest or detection." (Tr. 130).

On November 18, 1970, Didier met with Whiting at the airport at Zurich and redelivered Group No. 2 to him. Didier also supplied Whiting with coded instructions written in his own hand concerning the delivery and subsequent payment for the stock.*** (Tr. 133-138,

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* See Defendant's Case, page 13, *infra*.

** Parker testified that, after he was informed of Whiting's arrest on November 19, 1970, he cancelled this sale. (Tr. 327).

*** The Government contended that these complicated and coded payment instructions was further evidence of Didier's knowledge that this stock was stolen. First, the instructions hand-written by Didier employed the code of "father" when referring to Lombardozzi and "mother" when referring to Didier (Tr. 137-138). While the instructions specifically state that the proceeds of the sale could be available in New York, Didier instead instructed that they be "washed" through a series of bank accounts "for obvious reasons." The proceeds were to be

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GX 7). Didier instructed that the proceeds of the proposed sale, approximately $470,000, would be cabled to a bank in Nassau for distribution. (Tr. 346, 362-363). Didier's share, $160,000, along with Whiting's commission of approximately $28,000 would then be transferred to a Zurich bank. Lombardozzi's share of approximately $282,000, would be dispersed directly to him from Nassau. (Tr. 235-249, 170-174).

On his arrival in New York, Whiting, following Didier's instructions, proceeded directly to the Morgan Guaranty where he was arrested and Group No. 2 seized.* (Tr. 23-32).

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shipped first to Chase Manhattan Trust Co. Ltd. to the account of PMR Overseas, subaccount Lowjan. Parker testified that in all his prior dealings with Didier he had never known him to use this bank or account. (Tr. 330). After disbursement to Lombardozzi, the remaining funds were to be sent for disbursement to a Swiss bank account controlled by Didier. (Tr. 330-333).

* After his release on bail, posted by Lombardozzi, Whiting returned to Lombardozzi's home in Florida for a period from November, 1970 to March, 1971. During this period, Didier was telephoned on several occasions concerning the status of Group No. 1, and "Big John's" anxiety concerning the successful disposition of this stock. Didier assured his co-conspirators that an exchange for the stock of a Swiss company was in process but that ultimate sale and realization of the proceeds from this transaction would take time (Tr. 146-151).

To emphasize the seriousness of this situation, Whiting informed Didier that he had required personal intervention by "Big John" to avoid physical "reprisal" by "some people in New York" for his actions resulting in the loss of Group No. 2 (Tr. 154, 275-279).

To assist Whiting with his problems with the authorities, Didier delivered to Whiting certain documents and cables which Didier supplied as helpful in providing an innocent explanation concerning Whiting's involvement in the sale of Group No. 2. (Tr. 161-162; GX ....).

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Addendum

B. Defense Case:

The defendant Didier testified on his own behalf.

Didier testified that in 1970 he was employed as a director of P.M.R. GmbH, in Munich, Germany and president and principal shareholder of a Bahamian company, P.M.R. Ltd. Didier agreed with Whiting's account that they met in Los Angeles and had agreed to attempt to dispose of "letter" stock in Europe but denied that there had been any discussions concerning a similar disposition of stolen stock. Didier explained that it was for this purpose alone that an account in the name of Lowjan had been opened by Whiting with his company. (Tr. 447-458). As to the November 5, 1970, meeting in Nassau Didier testified that Group No. 2 rather than Group No. 1 was displayed to him. According to his accounts, Group No. 1 was not made available to him until November 18, 1970, the only date when he met with Whiting in Zurich, Switzerland. (Tr. 460-473, 529). Didier further testified that it was Parker, not himself, who set up the sales of both Group No. 1 and No. 2. (Tr. 485-486, 533-534) and that Parker was the source of the convoluted instructions for distribution of the proceeds of the Group No. 2 sale. (Tr. 496-497). As to the payment instructions in his handwriting given to Whiting at the Zurich airport, Didier's explanation was that Whiting had dictated the coded portion of those instructions to him. (Tr. 512-513).

Finally, in March, 1971, Lombardozzi told Whiting "to get out of town" and gave him $2500 for that purpose. Whiting obediently became a fugitive, assuming a new identity, until his arrest on November 18, 1972. It was after this second arrest that Whiting began to cooperate with the Federal Bureau of Investigation and describe Lombardozzi's and Didier's involvement in this conspiracy. (Tr. 165-168).

Addendum

On cross-examination, Didier admitted that the present version entirely contradicted his prior testimony of the sequence in which Groups Nos. 1 and 2 were made available to him. First, Didier had testified at his first trial that it had been Group No. 1, not Group No. 2 as he now claimed, that was the subject of the Nassau meeting. (Tr. 587-595). Further, Didier's prior testimony was that Didier did not examine Group No. 2 shares until he met with Whiting in Zurich in November, 1970. (Tr. 596). Also, Didier had previously admitted that there were two such Zurich meetings, not merely the one he now described. (Tr. 617-619).

Didier also admitted that he had been in the securities industry for fourteen years (Tr. 598-599), and was aware that "stop" orders meant that the stock may be stolen. (Tr. 611-612). Nevertheless, after being told of the "stops" on a portion of Group No. 1, Didier admitted that he exchanged this stock for $340,000 worth of the stock of a Swiss corporation, and that, in addition to his prospective share from Lombardozzi, he received a 5% "brokers" commission for arranging this sale. (Tr. 627-637; GX 32). Didier also conceded that this exchange ended in civil litigation because of the discovery of the "stops." (Tr. 636-639).

Finally, Didier admitted that while he had been employed by a member firm in New York, he became familiar with a New York Stock Exhange circular (GX 30) which specifically instructed that, because of security thefts, special precautions were to be taken in dealing in "street name" securities from individuals and that

proof of ownership should be insisted upon when such securities are presented. (Tr. 651, 657; GX 30).*

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* On redirect Didier attempted to redeem himself by testifying that he understood the strictures of the New York Stock Exchange ruling to apply to its members, and brokers. Thus, he reasoned, it was the American brokers and not Didier that should have exercised special care. (Tr. 660-634). On recross, Didier admitted that the reason the American brokers involved in the sale of Groups Nos. 1 and 2 did not follow the proper practice was that he, as their agent, did not follow those practices. (Tr. 672-674).

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AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

JOHN P. COONEY, JR. being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 7th day of September, 1976 he served ~~xxxxxx~~/ of the within two copies APPELLATE BRIEF, U.S.A. v. URBAN J. DIDIER, a/k/a "Harp" by placing the same in a properly postpaid franked envelope addressed:

JULIA P. HEIT, ESQ.
EDWARD MASRY, ESQ.
142 EAST 16TH STREET
NEW YORK, N.Y. 10003

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

John P. Cooney Jr.

Sworn to before me this
7th day of September, 1976.

Robert J. Costello

ROBERT J. COSTELLO
NOTARY PUBLIC, State of New York
No. 41-4509392
Qualified in Queens County
Commission Expires March 30, 1977.